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In The

Supreme Court of the United States

October Term, 1974

No. 74-633

HORACIO QUINONES,

Petitioner.

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

IRVING ANOLIK
Attorney for Petitioner
225 Broadway
New York, New York 10007
(212) 732-3050

(7802)
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In The

Supreme Court of the United States

October Term 1974

No.

HORACIO QUINONES,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

STATEMENT

Petitioner, Horacio Quinones, respectfully prays for this Court to grant a writ of certiorari to the United States Court of Appeals for the Second Circuit to review that Court's order of the 19th day of August, 1974, and a denial of a rehearing thereof dated the 23rd day of October, 1974, affirming a judgment of the United States District Court for the Southern District of New

York, convicting Quinones of a conspiracy to buy, sell, and transport narcotic drugs in violation of 21 U.S.C. §§173 and 174.

OPINION BELOW

The opinion of the United States Court of Appeals rendered the 19th day of August, 1974, is annexed hereto.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The Court of Appeals for the Second Circuit denied a motion for rehearing on October 23, 1974.*

QUESTIONS PRESENTED

1. Whether it was fundamentally unfair for the prosecution to subpoena Quinones before a Grand Jury without telling him he had already been indicted, and then obtain an incriminating statement from him in the absence of counsel outside the Grand Jury chamber?

2. Whether the Government has the right to interrogate any person without first advising him that he has already been indicted?

3. Whether the Trial Court was justified when in effect it amended the indictment by permitting introduction of evidence

*The docket numbers of the United States Court of Appeals cases were 74-108, 74-1567, and 74-1460.

against Quinones of an uncharged conspiracy to import drugs inside of "ski-poles"?

(A) Whether this unexpected ruling prevented petitioner from preparing for trial properly and from obtaining particulars?

4. Whether Quinones' rights to confrontation under the Sixth Amendment were violated by the Trial Court's ruling that an interpreter (Hysohion) need not be produced, despite the fact that he translated allegedly incriminating conversations between the prosecution's witness, Rimbaud, and the petitioner?

5. Whether petitioner was deprived of due process of law by virtue of the fact that he was subpoenaed before the Grand Jury by an Assistant United States Attorney, despite his having been indicted previously on a drug conspiracy charge, which fact was not disclosed to Quinones when he appeared in obedience to the subpoena and thought that he was being investigated for having smuggled letters out of the Federal House of Detention, not knowing at all that he was already a named defendant in a drug conspiracy charge?

(A) This raises the collateral question of whether a person whom the prosecutor knows is a named defendant in a pending indictment may be hoodwinked into talking with the prosecutor by lulling him into a false sense of security by making him think that a relatively minor charge is being investigated and that no indictment has yet been returned. (*Spano v. New York*, 360 U.S. 315; *United States v. Ash*, 413 U.S. 300, 320; *Berger v. United States*, 295 U.S. 78, 88; and *Brady v. Maryland*, 373 U.S. 83, 87-88).

6. Whether petitioner, an attorney, was denied a fair trial in violation of the Fifth Amendment of the United States Constitution when the Court permitted introduction of an alleged confession by Quinones to a charge which was severed from the trial, namely smuggling letters out of the Federal House of Detention?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth, Fifth and Sixth Amendments of the United States Constitution, as well as 21 U.S.C. §§173 and 174, are involved herein.

STATEMENT OF THE CASE

The petitioner herein is an attorney at law who has been practicing criminal law for a number of years, particularly among the Spanish-speaking community. The Government charged that there had been a continuing conspiracy which had existed for some three and a half years involving the purchase of large quantities of heroin from suppliers in France which were smuggled into the United States for sale and distribution here.

Edouard Rimbaud, a French purveyor of the narcotics, as well as Antonio Flores, an American buyer, were the principal operators of this alleged conspiracy.

The conspiracy allegedly commenced in 1968 through the offices of Joseph Lucarotti, a Frenchman then seving a term in the Atlantic Federal Penitentiary.

Rimbaud, in 1968, arrived in Montreal from France and sent a telegram to a New York address which Lucarotti had provided as that of his associate's wife. This associate's wife was Lillian Santana, who was married to a co-defendant of petitioner by the name of Ralph Santana.

The opinion of the Court of Appeals annexed hereto sets forth the facts as the jury could have found them, and there is no point in repeating them *in extenso* herein. Suffice it to say that there came a time when Rimbaud was arrested in connection with this conspiracy, together with Flores. After Flores was released from jail he arranged to retain petitioner Horacio Quinones for Rimbaud. The latter, it must be remembered, was primarily conversant in French and did not manage English to any significant extent. He testified at trial in French via an interpreter.

Quinones appeared at the Federal Detention Center at West Street, New York, and pressed Rimbaud to divulge the name of his French source for narcotics, which request Rimbaud declined. Rumbaud was anxious to raise $75,000 for bail.

As part of his plan to raise bail money, Rimbaud allegedly enlisted the aid of Quinones to smuggle certain letters out of West Street. The letters directed one of Rimbaud's associates in France to smuggle two kilograms of heroin into the United States secreted inside the hollow ski-poles (thus the name "ski-pole incident"). There was no count of the indictment referring to this.

The authorities, however, frustrated this plan when they intercepted the ski-poles and seized the heroin.

Rimbaud told Quinones that he had an associate in France who would pay him $7,500 for legal expenses which he was rendering to Rimbaud.

During the several meetings which Quinones had with Rimbaud in the West Street Detention Center, one Hysohion, a fellow imate of Rimbaud's, acted as an *ad hoc interpreter* since Rimbaud spoke primarily French, although he occasionally would use some English. At the trial itself, Rimbaud testified in French through an interpreter.

Quinones did not speak French to any extent.

There came a time that Quinones, who was a practicing attorney at law, received a subpoena for the Grand Jury from the United States Attorney's office in the Southern District.

Count Two of the indictment charged petitioner with allegedly smuggling letters out of the Federal House of Detention on West Street. This count was severed from the indictment and, therefore, presumably was not admissible in evidence.

Notwithstanding this fact, over objection, the Government was nevertheless permitted to adduce substantial evidence about the alleged smuggling of letters by Quinones out of the Federal House of Detention. The letters, however, with the possible exception of one, did not relate to the "ski-pole" conspiracy and, as a matter of fact, the witness Rimbaud admitted that several of the letters could very well have been addressed to Rimbaud's sweetheart, mother and friends (323-324—Rimbaud). Moreover,

these letters were written in French and, presumably, Quinones did not understand French since Rimbaud himself admitted that most of the time another inmate by the name of Hysohion had to translate during his conferences with Quinones.

With respect to the letter concerning the "ski-poles." Rimbaud declared that he did not discuss the contents of any letters with the petitioner but merely told him that he intended to pay his bail and go back to France (142-143—Rimbaud). Of course, this letter had nothing to do with the conspiracy charged in the indictment because it involved a completely different incident concerning the payment of bail. Numerous objections were, of course, interposed, as were motions for mistrial (140, 143-149 etc.—Rimbaud).

In connection with the charges of smuggling letters out of the Federal House of Detention, a subpoena was issued and served upon Quinones requiring his appearance before a Grand Jury of the Southern District of New York on the 22nd day of December, 1972. Supposedly this subpoena was to inquire about the alleged smuggling of letters out of the Federal House of Detention.

At the time of this subpoena, however, the trial counsel in the Court below, former Judge J. Howard Rossbach, accused the United States Attorney of improper conduct, "*a dirty trick*" if you will, since apparently the Government had already obtained a sealed indictment charging Quinones with a narcotics conspiracy at the time the subpoena was served.

It must therefore be taken into consideration that the purpose of subpoenaing Quinones, who was already a named

defendant in an indictment, was obviously to obtain information from him of an incriminating nature. It is submitted that this was a gross violation of the petitioner's rights.

Since, allegedly, the petitioner Quinones admitted when he appeared in Mr. Harris' office on the 22nd of December, 1972, that he indeed had taken some letters out of West Street for his client Rimbaud, the Government intended to use that admission as a "confession." The Court denied a motion to suppress however, which was made at the beginning of trial. The severing of the count did not eliminate the prejudice. We maintain that the Government had no right to subpoena Quinones without informing him that he had already been charged in an indictment and that they certainly had no right to use the pretense that they were investigating him concerning the smuggling of letters when, in actuality, they were interested in a narcotics conspiracy.

It is further apparent that Rimbaud's separate conspiracy wherein he sought to have heroin smuggled into the country in "ski-poles," could not have been part and parcel of the conspiracy for which he was indicted since it was a completely new conspiracy.

At Slip 5310 of the Court of Appeals' opinion, the Court of Appeals ruled that District Judge Bonsal "adequately protected Quinones against prejudice by instructing the jury that the 'ski-pole incident is not part of the conspiracy in this indictment and please don't consider the testimony about the ski-poles in determining the guilt or innocence of any of these defendants.'"

It must be borne in mind, however, that the jury had already heard all this evidence and we maintain that no juror could perform the mental gymnastic necessary to redact this information from his mind as the Court hoped it would. (*Bruton v. United States*, 391 U.S. 123.)

The Court below, at Slip 5311, erred in viewing the "ski-pole" testimony as being relevant to the conspiracy.

Quinones is an attorney at law and it is clear that he was acting as an attorney with respect to Rimbaud. We submit that at most Quinones was a "casual facilitator" and was in no sense of the word a participant in the conspiracy itself. (*United States v. Hysohion*, 448 F.2d 343 (2 Cir. 1971).)

REASONS FOR GRANTING THE WRIT

I.

Petitioner was gravely prejudiced when the prosecution was permitted to adduce evidence against him concerning his admissions to the trial prosecutor when he was subpoenaed as a witness before the Grand Jury that he had smuggled letters out of the Federal House of Detention at the behest of his erstwhile client, Rimbaud, one of the conspirators. This was a violation of Quinones' Fifth and Sixth Amendment rights to due process and the assistance of counsel since the prosecutor, but not the petitioner, knew that Quinones was already indicted on the drug conspiracy charge. The subpoena was obviously a ruse employed, seeking to obtain incriminating statements by lulling petitioner into a false sense of security that he might avoid indictment by being cooperative.

This Court has aptly declared in such cases as *Spano v. New York,* 360 U.S. 315, and *United States v. Ash,* 413 U.S. 300, that prosecutors are held to a high standard of fairness in their conduct of criminal prosecutions. See also, *Giglio v. United States,* 405 U.S. 150; *Berger v. United States,* 295 U.S. 78, 88; and *Brady v. Maryland,* 373 U.S. 83.

Indeed, this Court in *Ash,* recently declared:

> "In many ways the prosecutor, by accident or by design, may improperly subvert he trial. The primary safeguard against abuses of this kind is the ethical responsibility of the prosecutor, who, as so often has been said, may 'strike hard blows'

> but not 'foul ones.' *Berger v. United States*, 295 U.S. 78, 88 (1935); *Brady v. Maryland*, 373 U.S. 83, 87-88 (1963). If that safeguard fails, review remains available under the due process standards. See *Giglio v. United States*, 405 U.S. 150 (1972); *Mooney v. Holohan*, 294 U.S. 103, 112 (1935); *Miller v. Pate*, 386 U.S. 1 (1967); *Chambers v. Mississippi*, 410 U.S. 284 (1973)."

It is obvious that the only reason the prosecutor issued a subpoena to Quinones, knowing full well that Quinones was unaware of the fact that he had already been indicted, was to hoodwink him into giving a confession or incriminating statement. It is manifest that Quinones' testimony was not needed with respect to the drug conspiracy case because a true bill had already been filed.

With due respect to the Court below, we think it is somewhat naive for that august Tribunal to accept the prosecutor's explanation that he did not reveal the indictment to Quinones since no arrests had yet been made. This does not explain why Quinones was subpoenaed in the first place and leaves our position unassailed to the extent that we maintain that it was a "dirty trick" which this Court cannot permit in the prosecution of a criminal case. (See Court of Appeals' opinion below, Slip 5314; *Spano v. New York, supra; United States v. Ash, supra,* and *Mesarosh v. United States*, 352 U.S. 1 (1956).)

In *Spano* this Court, through its Chief Justice, condemned tactics such as these.

A. We ask this Court to hold that once a man has been indicted, that under no circumstances can he be interrogated without divulging the fact of an indictment to him.

Apparently the prosecution herein was of the view that the end justifies any means in connection with the investigation of a criminal case. Does this also mean that a prosecutor may abuse the processes of the Grand Jury in order to gain an unfair advantage over a named defendant in a criminal case? We think not.

We ask this Court to hold that under no circumstances may a prosecutor interrogate any indicted suspect in the absence of counsel and in the absence of his consent, without disclosing the fact of the indictment in advance. Cf., *People v. Spano*, 4 N.Y.2d 256, rev'd. sub nom, *Spano v. New York*, 360 U.S. 315. In *People v. Spano*, 4 N.Y.2d at 265, the three dissenting Judges, who were vindicated by this Court, held that the advent of an indictment precludes questioning of the defendant in the absence of counsel.

We submit that this case carries dangerous overtones, and lest other prosecutors be encouraged to utilize similar tactics, this Court should once and for all set the matter straight and declare such procedures anathema.

II.

It was error for the Trial Court to permit the co-conspirator Rimbaud to testify against petitioner (his former attorney) with respect to attorney-client conversations held in the House of Detention through the medium of an ad hoc interpreter in the guise of a fellow prisoner, Hysohion. No verification of the expertise of Hysohion as a translator or interpreter was offered, and Hysohion himself was not called as a witness, and thus was unavailable for cross-examination. This violated the Sixth Amendment.

There was testimony by Rimbaud, who was the main witness against the petitioner, that he had a number of conversations with Quinones in the House of Detention while Quinones represented him as an attorney at law. Since Rimbaud was fluent in French and Quinones was not, a fellow prisoner supposedly conversant in both languages, was utilized during these conversations as an interpreter and translator.

The expertise, however, of the interpreter, Hysohion, was never established, nor do we know what Hysohion actually told Quinones.

It is submitted that where a statement is obtained through an interpreter, the interpreter is the only person who can testify as to what was actually said and repeated. There was an essential deprivation of a right of confrontation in violation of the Sixth Amendment of the United States Constitution when the Court permitted this testimony without requiring the production of Hysohion. (*Smith v. Illinois*, 390 U.S. 129.)

III.

There was insufficient evidence as a matter of law and as a matter of due process to have warranted a conviction since petitioner was the attorney representing the Government informer, Rimbaud, and, at most, was a "casual facilitator" in the conspiracy. Quinones, moreover, was denied due process and deprived of an ability to defend himself when the Court permitted evidence of the "ski-pole" conspiracy to be introduced against him despite the fact that it was not mentioned in the indictment or the bill of particulars. The Court, therefore, pro tanto, amended the indictment.

We ask this Court to review the facts as found by the Court below in its opinion which is annexed to this petition. We maintain that even based upon that opinion, that it was error not to have reversed the conviction on the grounds of insufficiency of evidence as a matter of law. Petitioner has been a respected member of the legal community and is a practicing attorney at law at the time that this petition is being prepared.

In *United States v. Hysohion, supra,* the Court below itself articulated the fact that a mere casual facilitator cannot be deemed a member of a conspiracy. (See *United States v. Hysohion,* 448 F.2d at 347. See also, *United States v. Agueci,* 310 F.2d 817, 828 (2 Cir. 1962), cert. den. sub nom, *Guippone v. United States,* 372 U.S. 959.)

It should also be noted that for all intents and purposes the indictment herein was *pro tanto* amended when the Court permitted evidence of the "ski-pole incident", a separate

conspiracy, to be introduced against Quinones. This violated the letter and spirit of *Stirone v. United States*, 361 U.S. 212, 217, but also deprived the petitioner of an opportunity to prepare for this sort of defense since he did not know in advance that he would be asked to defend himself with respect to a completely different conspiracy than that charged in the indictment. He could not even obtain a bill of particulars thereon. (*Russell v. United States*, 369 U.S. 749; and *Ex Parte Bain*, 121 U.S. 1. See also, *United States v. De Calvalcante*, 440 F.2d 1264 (3 Cir. 1971).)

CONCLUSION

The petition for certiorari should be granted in all respects.

Respectfully submitted,

s/ Irving Anolik
Attorney for Petitioner

APPENDIX

OPINION OF THE COURT BELOW

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1114, 1115, 1163—September Term, 1973.

(Argued June 21, 1974 Decided August 19, 1974.)

Docket Nos. 74-1080, 74-1567, 74-1460

UNITED STATES OF AMERICA,

Appellee,

—against—

RALPH SANTANA, HERMAN RIVERA and HORACIO QUINONES,

Appellants.

Before:

SMITH and MANSFIELD, *Circuit Judges,* and BARTELS, *District Judge.**

Appeals from judgments of conviction entered in the United States District Court for the Southern District of New York after a jury trial before Dudley B. Bonsal, *Judge*, on an indictment charging a conspiracy to buy, sell and transport narcotic drugs in violation of 21 U.S.C. §§173 and 174.

Affirmed.

* Of the United States District Court for the Eastern District of New York, sitting by designation.

Opinion

ALBERT J. KRIEGER, Esq., New York, N.Y. (Alan Scribner, Esq., New York, N.Y., of counsel), *for Appellant Santana.*

IRVING ANOLIK, Esq., New York, N.Y., *for Appellant Quinones.*

JOEL A. BRENNER, Esq., Mineola, N.Y. (Diller & Schmukler, New York, N.Y., of counsel), *for Appellant Rivera.*

JEFFREY HARRIS, Assistant United States Attorney (Paul J. Curran, United States Attorney for the Southern District of New York, S. Andrew Schaffer, Assistant United States Attorney, New York, N.Y., of counsel), *for Appellee.*

MANSFIELD, *Circuit Judge:*

In January 1974, following a jury trial before Judge Dudley B. Bonsal in the Southern District of New York, appellants Ralph Santana, Herman Rivera and Horacio Quinones, who were named with numerous others (10 co-defendants and 10 co-conspirators) in an indictment charging them with participation in a far-flung international "French connection" type narcotics conspiracy in violation of 21 U.S.C. §§173 and 174, were convicted.[1] Upon this appeal each asserts numerous claims of error. Their convictions are affirmed.

The proof, viewed in the light most favorable to the Government, reveals the existence for some 3½ years of a continuing conspiracy to purchase large quantities of heroin from suppliers in France, which were smuggled

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1 Appellants were sentenced to serve prison terms as follows: Santana, 12 years; Rivera, 5 years; and Quinones, 5 years.

into the United States for sale and distribution here. The core operators were Edouard Rimbaud, a French purveyor of narcotics, and Antonio Flores, an American buyer. Theirs was the continuing relationship from which the acts of the other conspirators derived their meaning and purpose. The Rimbaud-Flores conspiracy began in 1968 when it was formed through the offices of Joseph Lucarotti, a Frenchman then serving a term in the Atlanta Federal Penitentiary ("Atlanta" herein). Lucarotti wrote from the penitentiary to Rimbaud, then in France, informing him that Lucarotti had a buyer for any heroin that Rimbaud might be able to supply. Rimbaud replied that he had a heroin source but no money to make the initial purchase in France. Lucarotti informed Rimbaud that he had an associate whose wife would provide him with $16,000 for this purchase.

The scene then shifted to Montreal. In 1968 Rimbaud arrived there from France and promptly sent a telegram to a New York address that Lucarotti had provided as that of his associate's wife. Several days later Lillian Santana, wife of appellant Ralph Santana, who was a prison-mate of Lucarotti in Atlanta, appeared at the Montreal hotel where Rimbaud was staying. After they discussed the sale she departed and later returned to the hotel with the $16,000 for the purchase of heroin. Equipped with these funds, Rimbaud arranged for the shipment of five kilograms of heroin from France to Montreal. The plan went awry, however, when one of Rimbaud's men, upon arrival at the Montreal airport, was forced to discard the heroin in order to avoid detection. When told of the mishap, Lillian Santana remarked that it would bother her husband. A few days later she arranged a direct meeting in Montreal between Rimbaud and Flores, the purchaser, at which Rimbaud advised Flores to come to France himself to pick up the next shipment of heroin.

Rimbaud returned to France and located more heroin for Flores. Flores then arrived in Paris accompanied by appellant Herman Rivera and one John "Buggy" Brown. Rimbaud, Flores and his companions next travelled to Avignon, France, where the delivery of two kilograms of heroin was made. At this point Flores returned to the United States, leaving to Rivera the task of smuggling the heroin into this country, which he completed successfully with the help of Brown. The heroin was delivered to Flores in New York.

For a period the Rimbaud-Flores arrangement established through Mrs. Santana worked smoothly. In January 1969, for instance, Rimbaud advised Flores in New York that he could ship 20 kilos of heroin from France to Montreal, which Flores agreed to buy at a price of $10,000 per kilo. The heroin was then smuggled into Canada through a courier, Edmund Taillet, who secreted it in musical instruments, and was delivered to Flores in two installments, payment being made by Flores to Rimbaud in Montreal.

Two months later Rimbaud was arrested in New York for his part in an unrelated narcotics transaction and held at the West Street Federal Detention Headquarters ("West Street" herein) in New York. Coincidentally, Flores found himself detained at West Street at the same time. During their sojourn there Flores attempted unsuccessfully to acquire from Rimbaud the name of the latter's French supplier. When Flores was released, he promised Rimbaud that he would send him an attorney. A few days later appellant Horacio Quinones appeared in court and announced that he was representing Rimbaud. During his subsequent interviews with Rimbaud at West Street, Quinones pressed Rimbaud for the name of his French source. Rimbaud consisently refused to divulge his source because he still entertained hopes of raising

his bail (fixed at $75,000) and returning to his own drug operations. As part of his plan to raise his bail money, Rimbaud enlisted the aid of Quinones in smuggling letters in and out of West Street. The letters directed one of Rimbaud's associates in France to smuggle two kilograms of heroin into the United States, secreted inside ski poles. The bail-raising plan collapsed, however, when the police intercepted the ski poles.

With his hopes of bail thus dashed, Rimbaud agreed to reveal the name of his French heroin source to Quinones. Quinones also prevailed upon Rimbaud to raise $7,500 in payment for the "legal" services being rendered by Quinones. (Flores had already paid Quinones $1,000 for taking the Rimbaud case.) Rimbaud told Quinones that an associate in France would pay him the $7,500. Quinones and Flores then traveled to France, Quinones to collect his $7,500, Flores to make his French connection. Thenceforth Flores conducted an extensive heroin smuggling business directly with Rimbaud's suppliers in France, who from 1969 to 1971 made a series of shipments through their courier, Edmund Taillet, to Flores and his successor, Anthony Segura, in New York.

Meanwhile Rimbaud languished in jail and in 1971 was sent to Atlanta to serve his sentence. There he met Ralph Santana, who expressed strong displeasure at Flores' handling of the drug purchases, stating that Flores had failed to pay his wife the $1,000 per kilo which apparently had been agreed upon as a commission for connecting Flores with the French heroin suppliers.

As this synopsis of the evidence suggests, each appellant was charged with a distinct part in furthering the overall conspiracy. Santana's role lay in connecting Flores with Rimbaud and the French suppliers. Rivera participated by smuggling a shipment of heroin that Flores had purchased

from Rimbaud. Quinones passed information from Rimbaud to Flores and from Rimbaud to his associate in France. The jury concluded that each of the appellants had thus played a role in the conspiracy.

Discussion

Santana's Claims

Santana's principal claim is that there was insufficient evidence to establish his participation in the conspiracy, independent of hearsay evidence admitted pursuant to the co-conspirator exception. See *Brown* v. *United States*, 150 U.S. 93 (1893). The settled rule in this Circuit, see *United States* v. *Geaney*, 417 F.2d 1116, 1120 (1969), *cert. denied sub nom. Lynch* v. *United States*, 397 U.S. 1028 (1970), is that the jury will be permitted to consider such hearsay only if the trial judge determines that the prosecution has proved the defendant's participation in the conspiracy by a fair preponderance of the evidence independent of co-conspirators' declarations. In this case the judge concluded that the prosecution had carried this burden. We agree.

The process of compartmentalizing hearsay and non-hearsay proof of conspiracy for the purpose of separately weighing the latter can sometimes be a difficult task, even for the experienced trial judge, principally because of the risk that incriminating hearsay may unconsciously influence the court's evaluation of relatively weak non-hearsay. In the present case the hearsay evidence against Santana was indeed strong. Following Lucarotti's letter to Rimbaud to the effect that his associate's wife would deliver the $16,000 needed to commence the drug smuggling operation and the loss of the first shipment jettisoned in Montreal, Mrs. Santana remarked to Rimbaud that *her husband* would be disturbed by this loss. However, the non-hearsay

evidence against Santana was scarcely less damaging. First of all, there was persuasive circumstantial proof of Santana's role. At the time when Lucarotti sent the message to Rimbaud that he (Lucarotti) had an associate in Atlanta whose wife would give Rimbaud $16,000 for the heroin, both Lucarotti and Santana were imprisoned at Atlanta. The appearance of Mrs. Santana shortly thereafter in Montreal with $16,000 for Rimbaud's use provides the basis for a strong inference that the arrangement had been made through her husband, who was acting as a link in the chain connecting Lucarotti and Rimbaud. Coupled with this circumstantial evidence is the direct admission later made by Santana to Rimbaud, after the latter became a prisoner in Atlanta, complaining that after he and his wife had connected Rimbaud and Flores the latter had failed any longer to make the agreed upon commission payments of $1,000 per kilo to Santana's wife. This admission, which falls outside the proscription of the hearsay rule, would probably be sufficient in itself to establish Santana's participation and that he had a "stake" in the conspiracy. See *United States* v. *Ragland*, 375 F.2d 471, 477 (2d Cir. 1967), *cert. denied*, 390 U.S. 925 (1968). When the admission is considered against the background of the circumstantial evidence, including Mrs. Santana's activities, the non-hearsay evidence was clearly sufficient to establish Santana's participation in the conspiracy, independent of any hearsay evidence from co-conspirators. See *United States* v. *Ragland*, *supra;* see also *United States* v. *Marrapese*, 486 F.2d 918, 921 (2d Cir. 1973), *cert. denied*, 42 U.S.L.W. 3536 (March 25, 1974), and *United States* v. *D'Amato*, 493 F.2d 359, 363-64 (2d Cir. 1974).

Santana further contends that on the basis of his very limited involvement he has improperly been drawn within

the dragnet of a wider conspiracy to which he was not a party. He argues that the evidence establishes at best that he and his wife were involved in the early stages, but that by January 1969 they had been eliminated from the operation as Flores began to deal directly with Rimbaud. We disagree. The evidence warranted a finding that Santana entered the conspiracy with full appreciation that he and Lucarotti were to connect Rimbaud and Flores for the purpose of promoting a *continuing* partnership in the importation and sale of illicit drugs. See *United States* v. *Bynum*, 485 F.2d 490, 495-97 (2d Cir. 1973), *vacated and remanded on other grounds*, 42 U.S.L.W. 3646 (May 28, 1974). The partnership in the importation of such large quantities of heroin would obviously require the coordination of others in a chain of distribution and sale over an indefinite period. This was not a "one-shot" venture. Indeed, Rimbaud testified that Santana's later lament to Rimbaud at Atlanta went to the very fact that after "they" (Santana and his wife) had connected "us" (Rimbaud and Flores), Flores had failed to pay the agreed commission ($1,000 per kilo) to Lillian Santana on each of his subsequent purchases from Rimbaud. Flores' non-payment of the commissions did not alter Santana's role in the conspiracy. Santana took no steps to withdraw. On the contrary, he still considered himself very much part of the ongoing operation, as his umbrage in Atlanta indicates. He had played his important role by connecting Rimbaud and Flores and he understood that during the period of the operation he and his wife would be paid their stake in the form of continuing commissions, just as would an agent who sold a life insurance policy. The evidence was more than sufficient to establish Santana's seminal but continuing role in the broad, ongoing conspiracy. See *United States* v. *Arroyo*, 494 F.2d 1316, 1319

(2d Cir. 1974); *United States* v. *Agueci*, 310 F.2d 817, 826-27 (2d Cir. 1962), *cert. denied*, 372 U.S. 959 (1963).

Rivera's Claims

Appellant Rivera pursues a similar vein in his assignment of errors. He argues first that the evidence of his involvement in the importation of two kilograms of heroin was insufficient to constitute him a member in the broader conspiracy for which he was charged. While we appreciate the dangers that may attend the charge of a multiple conspiracy, none of them is encountered here. Even the most rudimentary models reveal that a narcotics conspiracy of the chain type depends for its success on the employment of a number of persons, each of whom, while appreciating the scope of the overall business venture, performs a separate assigned task and does not necessarily know or work directly with all of the other participants. See *United States* v. *Bynum*, *supra*, 485 F.2d at 496-97; *United States* v. *Arroyo*, *supra*; *United States* v. *Agueci*, *supra*. One need not participate in each act of a conspiracy in order to be a part of it. A single act may suffice, if that act is one from which knowledge of the general conspiracy can be inferred. See *United States* v. *Ramirez*, 482 F.2d 807, 816 (2d Cir)., *cert. denied*, 414 U.S. 1012 (1973); *United States* v. *DeNoia*, 451 F.2d 979 (2d Cir. 1971); *United States* v. *Aviles*, 274 F.2d 179 (2d Cir.), *cert. denied sub nom. Genovese* v. *United States*, 362 U.S. 974 (1960).

Rivera's participation was hardly the neutral or ministerial act of some hapless minion. Rather he had consciously involved himself in an extended episode in importing drugs. See *United States* v. *Ramirez*, *supra*. He traveled to France, attended several meetings with Rimbaud, the seller, and Flores, the buyer, and then at Flores' instruction took delivery of two kilograms of heroin, which

he smuggled into the United States and delivered to Flores' representatives here. His actions constituted the very essence of the conspiracy charged, which was to buy, sell, and transport narcotic drugs. From the depth of his involvement with Flores and Rimbaud and from his actions themselves, the jury might infer Rivera's knowledge that he was participating in a broad ongoing conspiracy. See *United States* v. *Ramirez, supra; United States* v. *DeNoia, supra; United States* v. *Aviles, supra.*

Rivera's second point, that the Government's evidence proved multiple conspiracies rather than the single conspiracy charged in the indictment, must fail for the same reasons. The evidence supported the conclusion that he was consciously acting as part of a single large conspiracy. See, e.g., *United States* v. *Agueci*, 310 F.2d 817, 826-27 (2d Cir. 1962), *cert. denied*, 372 U.S. 959 (1963); *United States* v. *Bynum*, *supra*, 485 F.2d at 495-97; *United States* v. *Arroyo*, *supra*, 494 F.2d at 1319. The district court committed no error when it declined to give a multiple conspiracy instruction to the jury in the terms requested by the defendants. *United States* v. *Arroyo, supra.* Indeed, even if the evidence had established multiple conspiracies, Rivera could claim no prejudice, for the variance could not have affected his substantial rights. *United States* v. *Calabro*, 467 F.2d 973, 983 (2d Cir. 1972), *cert. denied*, 410 U.S. 926 (1973); *United States* v. *Agueci*, 310 F.2d 817, 827 (2d Cir. 1962), *cert. denied*, 372 U.S. 959 (1963).

Finally, Rivera challenges the court's failure to instruct the jury more specifically on the interest of a co-conspirator or accomplice who testifies for the prosecution. See *United States* v. *Padgent*, 432 F.2d 701 (2d Cir. 1970). The principal witnesses against Rivera were Rimbaud and Terry Paul Jones, both of whom had been implicated in the conspiracy and both of whom stood in the shadow of future prosecution at the will of the government. The district

court did instruct the jury that the testimony of such co-conspirators and accomplices should be subjected to "close and searching scrutiny," particularly because of their past criminal records. See *United States* v. *Caci*, 401 F.2d 664, 672 (2d Cir. 1968), *cert. denied*, 394 U.S. 917 (1969). Immediately preceding this admonition, the court had given an "interested-witness" charge, instructing the jury to decide whether a witness had an interest in the case. The defense counsel for their own part had during cross-examination and summation vigorously advanced their contention that these co-conspirators were testifying in an effort to improve their lot with the prosecutor and government.

It must be recognized that no talismanic formula has been prescribed as the caution to be given to a jury regarding accomplice testimony. Much turns on the evidence in each case. In the setting here, although the better course would have been for the trial judge to caution the jury to scrutinize the testimony of accomplices in terms of their possible motivations rather than simply their records and activities, we think that the issue of the co-conspirators' interest was "fairly put to the jury," *United States* v. *Blackwood*, 456 F.2d 526, 531 (2d Cir.), *cert. denied*, 409 U.S. 863 (1972), and that the court's instruction on accomplice and co-conspirator testimony was sufficient for that purpose. See *United States* v. *Ploof*, 464 F.2d 116 (2d Cir.), *cert. denied sub nom. Godin* v. *United States*, 409 U.S. 952 (1972); *United States* v. *Cataldo*, 433 F.2d 38, 41 (2d Cir. 1970), *cert. denied*, 401 U.S. 977 (1971), *reh. denied*, 402 U.S. 934 (1971); *United States* v. *Falange*, 426 F.2d 930, 933 (2d Cir.), *cert. denied*, 400 U.S. 906 (1970).

Quinones' Claims

Like the other appellants, Quinones argues that the evidence was insufficient to link him to the conspiracy. We

disagree. Quinones had been chosen by Flores to act nominally as legal counsel for Rimbaud. In fact, however, he did not limit himself to the performance of legal services. Indeed his efforts were devoted for the most part to unlawful efforts to carry out the conspiracy. From the outset, using his access as attorney to see his client Rimbaud at West Street, where Rimbaud was held, he sought to extract from Rimbaud the name of his French source so that Flores might continue the drug operation despite Rimbaud's incarceration. When Rimbaud, hoping to gain release on bail, balked at making the disclosure, Quinones agreed to assist him in an attempt to raise bail money by smuggling letters in and out of West Street for Rimbaud. The letters, apparently written in French but unsealed, were used to hatch and implement a plan for smuggling heroin into the United States in ski poles, with the proceeds from the sale of the heroin to be used to furnish bail money for Rimbaud.

Quinones argues that it was reversible error to have admitted the prejudicial testimony concerning the "ski pole" incident because it was an independent, irrelevant operation, not part of the conspiracy charged in the indictment. However, his counsel objected to the proof belatedly and then withdrew the objection insofar as it might be based on the claim that the ski-pole incident was not in furtherance of the conspiracy, which precludes review here. *United States* v. *Indiviglio*, 352 F.2d 276 (2d Cir. 1965) (*en banc*). Even assuming that the issue is reviewable, Judge Bonsal adequately protected Quinones against prejudice by instructing the jury that the "ski pole incident is not part of the conspiracy in this indictment and please don't consider the testimony about the ski poles in determining the guilt or innocence of any of these defendants." Furthermore, this instruction was overly gener-

ous. The evidence of the ski-pole incident was relevant to the conspiracy since it represented an attempt by Rimbaud to gain his freedom so that he could resume his active role as a participant. The jury was entitled to infer from all the circumstances that Quinones was assisting him with knowledge of his unlawful purpose and in furtherance of the conspiracy. See *United States* v. *Arroyo*, 494 F.2d 1316 (2d Cir. March 22, 1974), where, in a remarkably parallel situation, evidence of efforts to finance the release of a jailed co-conspirator, some by his lawyer who was later named as a defendant in the indictment charging a large scale narcotics conspiracy, by arranging an importation of heroin, was held admissible on the ground that such activities were in furtherance of the broad narcotics conspiracy alleged.

The ski-pole incident was also relevant to explain Rimbaud's subsequent decision to reveal his French source to Quinones. Only because his plan of raising bail money had been foiled by the Government's seizure of the ski poles did Rimbaud agree to give Quinones the information that he and Flores sought. Rimbaud then gave Quinones an unsealed letter of introduction to his French associate, Jean Dieupart, directing Dieupart to connect Flores with the French supplier, provided Flores would agree to pay a 5% commission to Rimbaud on subsequent transactions. At the same time Quinones told Rimbaud that his legal fee would be $8,500 and that Flores had already paid $1,000 toward it. Rimbaud discussed the contents of the letter with Quinones, assuring him that Dieupart would pay him the remainder of his fee. Quinones and Flores then went to France and upon his return Quinones notified Rimbaud that Flores had made his connection with the French source. The entire background of Quinones' smuggling of letters was thus probative of his guilty knowledge and intent.

Against this background of personal involvement, Quinones' argument that there was insufficient evidence to link him to the conspiracy borders on the frivolous. Quinones' participation, albeit belated, was crucial to the continuation of the single narcotics conspiracy charged in the indictment. Through Quinones Flores made direct contact with the French supplier and guaranteed the continued life of the operation in the face of Rimbaud's imprisonment.

Quinones alternatively claims that Rimbaud's version of their conversations in West Street was inadmissible hearsay because on several occasions he and Rimbaud had required the services of an interpreter, Christian Hysohion, who was a prisoner at West Street and Rimbaud's erstwhile cohort in crime, see *United States* v. *Hysohion,* 439 F.2d 274 (2d Cir. 1971). One-third to two-thirds of Rimbaud's conversations with Quinones were direct and in broken English. Rimbaud's first-hand testimony as to this portion of these conspiratorial conversations is beyond any hearsay challenge. As for that part of the conversation in which Hysohion acted as translator, he functioned as an agent for the two co-conspirators, Rimbaud and Quinones, which rendered admissible Rimbaud's testimony regarding statements made by Hysohion as an agent for Quinones.

The real concern here is less the hearsay nature of the Rimbaud testimony than it is the reliability of the Hysohion translation. See *United States* v. *Tijerina,* 412 F.2d 661, 664 (10th Cir.), *cert. denied,* 396 U.S. 990 (1969). We have, however, no reason to distrust the translation. No motive has been shown on the part of Hysohion to mislead either Rimbaud or Quinones. More importantly, as an external indicium of reliability attaching to the Hysohion translation, the actions that followed these conversations were entirely consistent with the content of the conversations

as translated. Cf. *United States* v. *Puco*, 476 F.2d 1099, 1102-05 (2d Cir.), *cert. denied*, 414 U.S. 844 (1973). We thus think it was proper to admit Rimbaud's testimony regarding these translated conversations. See *United States* v. *Tijerina, supra.*

As a final point Quinones objects to the use of certain admissions he made on the occasion of a visit to the United States Attorney's office. Quinones had been subpoenaed to appear before a grand jury investigating a narcotics case. He arrived too late to appear before the grand jury and went instead to the office of the Assistant United States Attorney handling the case. There he pressed the Assistant to tell him the reason for the subpoena. The Assistant advised him that he did not have to say anything and that he might be indicted on the matter then pending before the grand jury. Quinones insisted that he was anxious to cooperate. The Assistant then asked him whether he knew that it was a crime to smuggle letters from West Street and whether he had in fact smuggled any letters from there. Quinones replied that he had. After being fully advised of his rights, Quinones answered further questions concerning his role in the Flores case. At trial on the conspiracy charge the prosecution introduced these admissions in evidence against Quinones.

At a pretrial suppression hearing the Government disclosed that Quinones was already under a sealed indictment for the present conspiracy at the time he made these admissions to the Assistant United States Attorney.[2] Quinones now objects that he was lulled into making an admission by the prosecutor's failure to advise him that he

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2 On October 25, 1972, a sealed indictment charging 16 defendants, including Quinones, with a conspiracy to import drugs was issued. Quinones made his admission to the Assistant United States Attorney on December 22, 1972. In 1973 two superseding indictments were issued. The latter of these formed the basis for the present case.

was already under indictment. The prosecutor replies that he did not disclose the indictment to Quinones because none of the other members of the conspiracy named in the indictment had yet been arrested on the bench warrants issued for their arrest and that to reveal the existence of the indictment might jeopardize the Government's chances of locating them.

Quinones could hardly have been lulled into making his admissions. Compare *Spano* v. *New York*, 360 U.S. 315 (1959). He knew that the United States Attorney was investigating his role in the drug operation; he was warned that he might be indicted in the pending narcotics case; finally, he was advised that he need make no statements, a warning that Quinones as an attorney experienced in the practice of criminal law must have appreciated and fully understood. Quinones nonetheless chose to admit his role in smuggling letters, apparently because he thought that his admission would lend credibility to his denial of knowledge of the contents of the letters and thus avoid being implicated in the narcotics offense. Thus he was not lulled into admitting his part in smuggling letters from a federal prison, itself a felony offense (18 U.S.C. §1791). Rather he made the admission in a calculated effort to exculpate himself from the more serious narcotics charge under consideration, which would probably carry a mandatory minimum prison term if he should be indicted and found guilty. Given Quinones' awareness of the situation, we think the failure to disclose the sealed indictment did not materially affect his admissions. The evidence was thus properly admitted against him.

We find all other points raised by appellants to be without merit. The judgments of the district court are affirmed.

ORDER OF AFFIRMANCE

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 19th day of August, 1974.

PRESENT:

Hon. J. JOSEPH SMITH

Hon. WALTER R. MANSFIELD, Circuit Judges,

Hon. JOHN R. BARTELS, District Judge.*

Docket Nos. 74-1080, 74-1567,
74-1460

UNITED STATES OF AMERICA,

Appellee,

-against-

RALPH SANTANA, HERMAN RIVERA and HORACIO QUINONES,

Appellants.

* Of the United States District Court for the Eastern District of New York, sitting by designation.

Order of Affirmance

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

s/ A. Daniel Fusaro
A. DANIEL FUSARO
Clerk

ORDERS OF UNITED STATES COURT OF APPEALS DATED OCTOBER 23, 1974

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-third day of October, one thousand nine hundred and seventy-four.

Present:

HON. J. JOSEPH SMITH,

HON. WALTER R. MANSFIELD,
Circuit Judges

HON. JOHN R. BARTELS,
District Judge

Orders

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

ANTONIO FLORES, JOSEPH LUCAROTTI, RALPH SANTANA, LILLIAN SANTANA, DELIA BURGOS, a/k/a Dee-l, HERMAN RIVERA, JEAN BAPTISTE CROCE, a/k/a Jean Bati-l, HORACIO QUINONES, JOSEPH MARRO, JEAN CARDON, GEORGE ALVAREZ, JOHN DOE, a/k/a ROBER DU BOIS, ROBERT MARTINEZ, FELIZ OLIVIE,

Defendants

RALPH SANTANA, HORACIO QUINONES, HERMAN RIVERA,

Defendants-Appellants

Docket No. 74-1080

A petition for a rehearing having been filed herein by counsel for the appellant, HORACIO QUINONES,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

s/ A. Daniel Fusaro
A. DANIEL FUSARO
Clerk

Orders

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-third day of October, one thousand nine hundred and seventy-four.

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

ANTONIO FLORES, JOSEPH LUCAROTTI, RALPH SANTANA, LILLIAN SANTANA, DELIA BURGOS, a/k/a Dee-l, HERMAN RIVERA, JEAN BAPTISTE CROCE, a/k/a Jean Bati-l, HORACIO QUINONES, JOSEPH MARRO, JEAN CARDON, GEORGE ALVAREZ, JOHN DOE, a/k/a ROBER DU BOIS, ROBERT MARTINEZ, FELIZ OLIVIE,

Defendants

RALPH SANTANA, JORACIO QUINONES, HERMAN RIVERA,

Defendants-Appellants

Orders

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellant, HORACIO QUINONES, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

s/ Irving R. Kaufman
Chief Judge
IRVING R. KAUFMAN

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-633

HORACIO QUINONES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App.) is reported at 503 F. 2d 710.

JURISDICTION

The judgment of the court of appeals was entered on August 19, 1974 (Pet. App. 17a–18a). A petition for rehearing was denied on October 23, 1974 (Pet. App. 19a–22a). The petition for a writ of certiorari was filed on November 22, 1974. The jurisdiction of this Court has been invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence introduced at trial was sufficient to support petitioner's conviction.

2. Whether the trial court erred in admitting testi-

mony regarding conversations between petitioner and a co-conspirator without requiring the translator to appear as a witness.

3. Whether evidence of a criminal transaction not specifically alleged in the indictment was properly admitted.

4. Whether certain incriminating statements made by petitioner to the prosecuting attorney were properly admitted.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of conspiring to buy, sell and transport narcotic drugs, in violation of 21 U.S.C. (1964 ed.) 173 and 174. He was sentenced to a term of five years' imprisonment. The court of appeals affirmed (Pet. App.).

Petitioner was convicted for his role in an international narcotics conspiracy involving over a three and one-half year period the purchase of large quantities of heroin from suppliers in France and the subsequent importation of the heroin into the United States for sale and distribution. The central figures in the operation were Edouard Rimbaud, a French seller of narcotics, and Antonio Flores, an American buyer. The Rimbaud-Flores operation began in 1968, when it was formed through the efforts of Joseph Lucarotti. When informed that Lucarotti had a buyer for heroin, Rimbaud agreed to supply the narcotics from an undisclosed source (Tr. 101–105).[1]

[1] "Tr." refers to the transcript of the trial. "H." refers to the transcript of the pretrial suppression hearing.

In July 1968, Rimbaud traveled to Montreal to negotiate the details of the smuggling scheme with the wife of a Lucarotti associate (Ralph Santana, a co-defendant). At the conclusion of these negotiations, Rimbaud was given $16,000 to finance the purchase of heroin in France. He returned to France with the money and purchased a quantity of heroin, but the initial attempt to ship the heroin from France to Montreal was aborted (Tr. 106–116). Thereafter, Flores arrived in France personally to supervise the smuggling operation (Tr. 116–123, 579–581).

The Rimbaud-Flores operation functioned successfully until March 1969, when Rimbaud was arrested in connection with an unrelated narcotics scheme. Rimbaud was held at the West Street Federal Detention Headquarters in New York City, where, by coincidence, Flores was briefly detained at the same time (Tr. 134–136). Flores repeatedly, although unsuccessfully, attempted to learn the identity of Rimbaud's French supplier. Following his release, Flores persisted in his inquiry through petitioner, an attorney whom Flores had retained to represent Rimbaud (Tr. 136–138, 150). During subsequent interviews with Rimbaud, who remained incarcerated, petitioner was unable to discover the identity of the French supplier. Rimbaud's intransigence hinged on his hope of raising bail (set at $75,000) and resuming his central role in the narcotics operation (Tr. 142–143).

As part of his plan to raise the bail money, Rimbaud enlisted petitioner's assistance in smuggling unsealed letters in and out of the detention center (Tr. 141–142). Petitioner was careful to emphasize to Rim-

baud the need for caution in this undertaking (Tr. 139). The letters smuggled out of the center by petitioner were addressed to Jean Dieupart, a French associate of Rimbaud, and outlined a plan to smuggle two kilograms of heroin into the United States, secreted inside ski poles. The scheme ended in failure, however, when the police seized the ski poles (Tr. 144–150).

Resigned to continued imprisonment, Rimbaud agreed to divulge the name of his supplier to Flores. Petitioner then smuggled out of the detention center another letter from Rimbaud that instructed Dieupart to connect Flores with the French supplier (Tr. 151). This letter, like the ones that previously had been smuggled in and out of the detention center, was unsealed, and its contents were discussed by Rimbaud and petitioner (Tr. 151–153). At this time Rimbaud also agreed to pay petitioner an additional $7,500 for "legal" services rendered, Flores having already made an initial payment of $1,000. Petitioner was informed that Dieupart would pay the "legal fee." Thereafter, Flores and petitioner journeyed to France. Upon his return, petitioner reported to Rimbaud that Flores had made contact with Rimbaud's French supplier and that he had received his "legal fee" (Tr. 150–154). Flores subsequently conducted an extensive narcotics trade directly with Rimbaud's former supplier in France. The series of shipments comprising this trade continued until 1971 (Tr. 397–403).

ARGUMENT

1. Petitioner's claim that there was insufficient evidence to establish his participation in the conspiracy is without merit. Petitioner does not, in support of

this claim, provide any analysis of the evidence introduced (or lacking) at trial, apparently being content with the assertion that he "has been a respected member of the legal community and is a practicing attorney at law at the time that this petition is being prepared" and with the characterization of his role as that of "a mere casual facilitator" (Pet. 14). At the same time, however, petitioner admits that it was Flores who originally arranged to have him represent Rimbaud and that he had "pressed Rimbaud to divulge the name of his French source for narcotics" (Pet. 5). Petitioner offers no explanation in his petition for his desire to know who Rimbaud's supplier in France had been; the jury apparently believed, with substantial justification, that petitioner desired the information so that he could convey it to Flores.

In rejecting petitioner's challenge to the sufficiency of the evidence, the court of appeals found (Pet. App. 12a–13a):

> * * * [Petitioner] did not limit himself to the performance of legal services. Indeed his efforts were devoted for the most part to unlawful efforts to carry out the conspiracy. From the outset, using his access as attorney to see his client Rimbaud at West Street, where Rimbaud was held, [petitioner] sought to extract from Rimbaud the name of his French source so that Flores might continue the drug operation despite Rimbaud's incarceration. When Rimbaud, hoping to gain release on bail, balked at making the disclosure, [petitioner] agreed to assist him in an attempt to raise bail money by smuggling letters in and out of West Street

> for Rimbaud. The letters, apparently written in French but unsealed, were used to hatch and implement a plan for smuggling heroin into the United States in ski poles, with the proceeds from the sale of the heroin to be used to furnish bail money for Rimbaud.
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> * * * Only because his plan of raising bail money had been foiled by the Government's seizure of the ski poles did Rimbaud agree to give [petitioner] the information that he and Flores sought. Rimbaud then gave [petitioner] an unsealed letter of introduction to his French associate, Jean Dieupart, directing Dieupart to connect Flores with the French supplier, provided Flores would agree to pay a 5% commission to Rimbaud on subsequent transactions. At the same time [petitioner] told Rimbaud that his legal fee would be $8,500 and that Flores had already paid $1,000 toward it. Rimbaud discussed the contents of the letter with [petitioner], assuring him that Dieupart would pay him the remainder of his fee. [Petitioner] and Flores then went to France and upon his return [petitioner] notified Rimbaud that Flores had made his connection with the French source.

As noted above, petitioner admits some of the more crucial of these findings. Ample evidence was introduced at trial to support the jury's verdict. *Glasser* v. *United States*, 315 U.S. 60, 80.

2. Petitioner also contends that the trial court erred in allowing Rimbaud to recount conversations that had taken place between himself and petitioner, because parts of these conversations were aided by a

translator who did not testify at trial.[2] A similar argument was raised and rejected in *United States* v. *Tijerina*, 412 F. 2d 661, 664 (C.A. 10), certiorari denied, 396 U.S. 990. Here, the argument for the admissibility of the translator-assisted statements is even more compelling than it was in *Tijerina*. Hysohion (the translator) mediated the conversations relating to criminal activity between two co-conspirators, acting at their behest. The record does not suggest that the translations were inaccurate or unreliable, and Rimbaud was subjected to rigorous cross-examination regarding the content of the conversations. Nor was Hysohion shown to have a motive for misleading either Rimbaud or petitioner. Indeed, it seems highly doubtful that Hysohion could have successfully misled petitioner and Rimbaud, since Rimbaud testified that petitioner and he were able to communicate sufficiently well unaided that between one-third and two-thirds of the conversations were conducted without Hysohion's assistance (Tr. 307). Furthermore, the conduct of the parties following the conversations was wholly consistent with the substance of Rimbaud's testimony. Cf. *United States* v. *Puco*, 476 F. 2d 1099, 1104 (C.A. 2), certiorari denied, 414 U.S. 844.

This is not therefore a case in which a defendant was implicated at trial by the out-of-court statements of a person whom he was not given an opportunity to confront, in violation of the Sixth Amendment. Petitioner had every opportunity, through cross-

[2] The translator was Christian Hysohion, a confederate in crime with Rimbaud. See *United States* v. *Hysohion*, 439 F. 2d 274 (C.A. 2), for a discussion of their activities.

examination of Rimbaud or through his own testimony, to convince the jury either that he did not understand significant aspects of what was being said to him by Rimbaud or that he was the victim of an erroneous translation. In fact, however, the activities engaged in by petitioner pursuant to Rimbaud's instruction belied any claim that he did not understand those instructions or that he was the victim of an erroneous translation. The fact that some, but not all, of petitioner's conversation with Rimbaud was aided by a translator may go to the weight of the testimony, but it does not affect its admissibility. *United States* v. *Tijerina, supra,* 412 F. 2d at 664.[3]

3. Petitioner also argues that testimony concerning his role in the aborted scheme to import heroin into the United States in ski poles was improperly admitted. Even disregarding petitioner's failure to raise a timely objection to such testimony,[4] his contention is specious. Rather than being an independent event, the incident constituted an integral part of the massive conspiracy to import narcotics with which peti-

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[3] Petitioner's intimation that the conversations were protected by the attorney-client privilege is clearly erroneous. If such a privilege applied to the conversations, it could be claimed only on behalf of the client, not the attorney. Moreover, the privilege does not protect conversations that promote a criminal undertaking.

[4] No objection was raised to testimony relating to the "ski pole" incident until after Rimbaud had recounted the entire plan and petitioner's role in it. Counsel for a co-defendant (Santana) then suggested that the incident might be outside the scope of the conspiracy with which the defendants were charged (Tr. 146). Petitioner subsequently joined in the objection, but after the government made an offer of proof petitioner withdrew his objection (Tr. 147).

tioner was charged. See, *e.g.*, *United States* v. *Agueci*, 310 F. 2d 817, 826–827 (C.A. 2), certiorari denied, 372 U.S. 959.

A nearly identical situation was presented in *United States* v. *Arroyo*, 494 F. 2d 1316 (C.A. 2), certiorari denied, No. 73–1574, October 15, 1974. Also faced with a far-flung narcotics conspiracy, the *Arroyo* court admitted testimony concerning a drug importation scheme designed to facilitate a jailed co-conspirator's release and an alternate plan to assist his escape. As here, an attorney was convicted for his role in coordinating the plans. Both incidents were found to have been in furtherance of a single, broad conspiracy. *United States* v. *Arroyo*, *supra*, 494 F. 2d at 1317–1319.[5]

5. Finally, petitioner challenges the use at trial of certain admissions that he made during a visit to the United States Attorney's office. The facts relating to this challenge were succinctly set forth by the court of appeals (Pet. App. 15a):

[5] The failure of the "ski pole" incident was also relevant in explaining the events that followed. The timing of Rimbaud's disclosure of his source of supply, petitioner's trip to France, and the subsequent emergence of Flores as the central figure in the conspiracy circumstantially point to petitioner's knowing participation in the conspiracy. See *United States* v. *Miller*, 478 F. 2d 1315, 1317 (C.A. 2), certiorari denied, 414 U.S. 851. Moreover, petitioner's prior participation in a similar scheme was probative of his knowledge and intent in assisting Flores to uncover Rimbaud's supplier. *United States* v. *Catalano*, 491 F. 2d 268, 275–276 (C.A. 2).

In any event, the court adequately protected petitioner by cautioning the jury that the "ski pole incident is not part of the conspiracy in this indictment and please don't consider the testimony about the ski poles in determining the guilt or innocence of any of these defendants" (Pet. App. 12a).

> [Petitioner] had been subpoenaed to appear before a grand jury investigating a narcotics case. He arrived too late to appear before the grand jury and went instead to the office of the Assistant United States Attorney handling the case. There he pressed the Assistant to tell him the reason for the subpoena. The Assistant advised him that he did not have to say anything and that he might be indicted on the matter then pending before the grand jury. [Petitioner] insisted that he was anxious to cooperate. The Assistant then asked him whether he knew that it was a crime to smuggle letters from West Street and whether he had in fact smuggled any letters from there. [Petitioner] replied that he had. After being fully advised of his rights, [he] answered further questions concerning his role in the Flores case. At trial on the conspiracy charge the prosecutor introduced these admissions in evidence against [petitioner].

Petitioner now contends that he was "lulled" into making incriminating statements because the prosecutor did not advise him that he was already under a sealed indictment in the present narcotics conspiracy.[6] Neither petitioner's argument nor his reliance on *Spano* v. *New York*, 360 U.S. 315, is persuasive.[7] Peti-

[6] None of the sixteen co-conspirators named in the indictment had been apprehended at the time, and disclosure of the existence of the indictment would probably have hampered attempts to apprehend them.

[7] The specter presented in *Spano* of a protracted interrogation of a foreign-born, uneducated, emotionally unstable young man, held incommunicado by a battery of law enforcement officers, presents a stark contrast to the facts presented in the instant case. *Spano* v. *New York*, *supra*, 360 U.S. at 316–319.

tioner, an experienced criminal attorney, was aware of the nature of the investigation being conducted by the government attorney and the grand jury; he was apprised of his potential liability in the case; and, finally, he was advised of his right not to incriminate himself. Despite this, petitioner freely elected to admit that he had smuggled letters out of the West Street Federal Detention Headquarters, a felony for which he could have received ten years' imprisonment and been disbarred. See 18 U.S.C. 1791. Far from being a case in which admissions were made involuntarily, the record demonstrates "a calculated effort [by petitioner] to exculpate himself from the more serious narcotics charge" (Pet. App. 16a). As such, it cannot be said that the non-disclosure of the sealed indictment led to a deprivation of due process. See *United States* v. *Diggs*, 497 F. 2d 391, 393 (C.A. 2), certiorari denied, No. 73-6831, October 15, 1974.

[*] At trial, petitioner's admissions were received without objection (Tr. 562-568). Petitioner himself subsequently introduced into evidence portions of a report written by the agent who had witnessed his admissions, on the theory that his statements were exculpatory rather than incriminating (Tr. 573-574). Following the denial of his pretrial motion to suppress, petitioner also freely admitted to the court that he had smuggled letters in and out of the detention center (H. 52).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.
JOHN C. KEENEY,
Acting Assistant Attorney General.
JEROME M. FEIT,
ROBERT J. ERICKSON,
Attorneys.

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